**Reasoning Globally:**

**With a Little Help from Their Friends**

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**Abstract**

The judicial globalization literature, and attempts to study it in the United States, has focused on the role of the judge as a deliberate, independent actor in the international environment. Research on Supreme Court opinion content, however, suggests that the opinion language is often influenced by actors outside of the judiciary itself. In this study, I assess the effect of transnational citations by parties’ and amici brief on the Supreme Court’s engagement in global judicial dialogue. I use an original database of foreign and international law citations in briefs and opinions, and overall, I show that, litigants and friends of the court are significant actors in this process of judicial globalization.

**Introduction**

In the 2005 case of *Roper* v. *Simmons*, the United States Supreme Court found that sentencing juveniles to death is a violation of the Eighth Amendment. The majority opinion, authored by Justice Kennedy, stated, among other things, that “Article 37 of the United Nations Convention on the Rights of the Child, which every country of the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18” (*Roper* v*. Simmons* 2005,22). With the use of this citation, in addition to offering his opinion on the other branches’ behavior on international matters, Justice Kennedy appeared to reaffirm a seemingly increasing trend in Supreme Court opinion writing: the citing of foreign or international law materials in domestic cases. Before *Roper v. Simmons*, the U.S. Supreme Court had brought this practice to the forefront by utilizing foreign or international law in several high-profile cases, including *Lawrence v. Texas* (2003) and *Grutter v. Bollinger* (2003).

While the engagement of the United States Supreme Court in this transnational dialogue in *Roper* v. *Simmons* did not remain unnoticed by the Court’s audience, less attention was paid to the number and diversity of briefs filed at the merits stage of the case, citing various sources of foreign and international law. Simmons’ lawyers cited four international treaties and a decision by the Inter-American Court of Human Rights in their merits brief. Additionally, five amici, ranging from the ACLU to the European Union, including 37 citations to decisions of foreign national courts, and international courts and treaties.

Despite above indications that lawyers and interest groups do play a role in cases when courts engage in transnational communication, the judicial globalization literature, at least in the United States, has mostly focused on the role that Justices of the U.S. Supreme Court play in global judicial dialogue. Research on the influence of briefs on judicial behavior, however, suggests that by ignoring actors such as lawyers and amici, we might be missing an important aspect of judicial globalization.

In this study, I bridge the judicial globalization and American judicial behavior literatures, so as to assess whether global judicial dialogue is a process solely driven from above, or if lawyers and interest groups are also essential participants. I argue that amici and parties’ briefs provide the Justices of the Supreme Court with important information regarding developments in foreign and international law and their relevance to the cases under consideration. This, in turn, gives Justices who are amenable to transnational communication the opportunity to include such citations in their written opinions.

To test this argument, I constructed an original dataset of foreign and international law citations found in parties’ and amici briefs, as well as of transnational citations in Supreme Court opinions, from 1989 to 2015. The analysis of the data indicates that Supreme Court Justices are more likely to engage in transnational communication when provided with relevant arguments in the briefs of a case. The findings of this study illustrate the importance of actors other than the judiciary in the promotion of a global judicial structure, and provide support to previous findings regarding the effect of briefs in the process of judicial decision-making.

**Judicial Globalization from Below**

The steady increase of the national courts’ reliance on foreign and international law citations in their opinions, labeled “transnational communication”, has established domestic judges as significant, independent actors in the international environment (Slaughter 1994). As part of the process of judicial globalization, judges travel abroad, participate in international conferences, meet with their colleagues, and through this direct communication, they gather information about legal developments across borders (Slaughter 2004).

Apart from this direct learning process, advancements in technology are also suggested to be facilitating transnational communication among judges. Court opinions from all over the world are now translated in English and published online, making it easier for judges to consult foreign sources in the process of deciding a case (Slaughter 2004). These developments, according to the judicial globalization literature, have made domestic judges significant actors in the establishment and enforcement of international law domestically, especially when it comes to the effective enforcement of international human rights (Diel, Ku, and Zamora 2003, 50; Waters 2007, 633).

Considering the literature’s focus on the judge as an individual with cosmopolitan preferences (Breyer 2015), it is probably unsurprising that the few studies that move beyond a normative discussion of the phenomenon in the United States choose to pay attention to the ways judges utilize transnational sources. Even in this aspect, research has reached contradictory conclusions, since on one hand, Supreme Court Justices appear to engage in this behavior strategically, so as to increase the persuasiveness of their decision (Black et al. 2014), and, on the other, federal judges are suggested to make a very limited use of transjudicial communication, mostly in cases that already involve foreign law (O’Brian 2006; Zaring 2006).

I argue that, to be able to acquire a more complete understanding of judicial globalization, we should move our focus beyond the judges as the sole actors in this dialogue and examine other actors that potentially affect the proliferation of transnational communication. As research on the revolution of rights has shown, willing judges are not the only necessary condition for the development of domestic law; strategic advocacy pressuring the judiciary from below is also required (Epp 1998).

This emphasis on pressures from below is also present in the international environment, where international organizations and transnational activist networks attempt to pressure states to adopt and enforce international norms domestically. In this way, international organizations function as teachers of international norms (Finnemore 1993; 1996), and transnational and activist networks push for their internalization (Keck and Sikkink 1998; Risse-Kappen, Ropp, and Sikkink 1999). This “transnational civil society”, in many ways similar to the existing one in the United States in the era following *Brown* v. *Board of Education*, is suggested to have helped judges around the world acquire the status of independent actors in the international system (Kersch 2004).

One way for these groups to internalize foreign and international law through the domestic judiciary is by filing amici briefs that cite foreign and international law, since such briefs give groups the opportunity to communicate to judges what they think the interpretation of a law should be (Collins, Corley, and Hamner 2015). Judges, on the other hand, trying to gather as much knowledge as possible regarding the case under deliberation, find amici briefs useful due to the information provided through them (Collins 2008; Epstein 1993).

Specifically, amici briefs can include reliable information regarding the wider consequences of a case outcome (Caldeira and Wright 1988; Collins 2004), as well as arguments and authorities missing from the parties’ briefs (Kearney and Merrill 2000; McGuire 1993). These particular characteristics of amici briefs make them an effective tool of influence of Supreme Court Justices, who often adopt the language and authorities included in the briefs (Collins, Corley, and Hamner 2015; Ennis 1984; Epstein and Kobylka 1992; Owens and Epstein 2005; but see Spriggs and Wahlbeck 1997).

Apart from the amici briefs filed in a case, judges acquire information from the briefs submitted by the parties. Parties’ merits briefs familiarize judges with the facts of a case and inform them about the legal authorities pertinent to the issue at hand. Judges, in turn, when they construct their written opinion, give special attention to the language used in the merits briefs, since they appear to rely on them more, compared to language stemming from lower court opinions and amici briefs (Feldman 2017). In fact, certain Supreme Court Justices seem to use merits briefs as their main tool in the process of opinion writing, by lifting extensive parts of the opinion language directly from the parties’ briefs (Feldman 2016). Based on this evidence, “the parties, through the briefs submitted on the merits, have the ability to influence the content of opinions, and consequently, have the ability to influence the law” (Corley 2008).

If the content of the opinion produced by the Supreme Court is shaped to such a great extent by the parties involved in the litigation, and by the friends of the court with an interest in the outcome of the case (Wahlbeck 1997), then, the instances of transnational communication occurring through Supreme Court opinions might not be solely a result of the Justices’ active search for these authorities, but also of the inclusion of this type of language in the briefs. Specifically, I argue that, just as social science sources made their way into Supreme Court opinions through briefs (Epstein and Black 2007; Margolis 2000), the inclusion of foreign and international law authorities in parties’ and amici briefs informs judges of legal developments beyond the domestic borders, along with their potential applications on a case. Consequently, I expect that the citation of transnational authorities in the briefs of a case will increase the likelihood of transnational communication on behalf of U.S. Supreme Court Justices.

H1: Foreign and international law citations are more likely to be used in Supreme Court opinions when such authorities are referenced in the parties’ briefs on the merits, compared to cases where parties’ briefs cite solely domestic law.

H2: Foreign and international law citations are more likely to be used in Supreme Court opinions when such authorities are referenced in the amici briefs on the merits, compared to cases where the amici briefs cite solely domestic law.

It should be noted at this point that, in this study, I do not theorize on the reasons behind a Justice’s choice to engage in transnational communication. Justices who rely on foreign and international law citations in their written opinions might do so because they consider these authorities persuasive, or because they have adopted a cosmopolitan attitude, or simply because they need as many sources as possible to support the outcome they prefer. Regardless of the reasoning, the fact is that transnational citations do appear in court opinions; the focus of this study then is the route that these citations follow to become part of the Supreme Court language.

**Data and Methods**

For the purpose of this study, transnational communication includes the citation of foreign law, foreign national court decisions, international treaties and decisions made by international courts. The focus of the analysis is the United States Supreme Court and its citation practices from 1989 to 2015. This specific range of years was chosen in order for the study to cover the beginning of judicial globalization, and, at the same time, to ensure the availability of data, especially when it comes to amicus briefs filed at the merits stage.

To test my hypotheses, I created an original dataset of foreign and international law citations in parties’ and amici briefs. To construct the initial dataset, I downloaded the *Lexis* identifications for all the cases the Supreme Court decided between 1989 and 2015 from the Supreme Court Database (Spaeth et al. 2016). After perusing the cases on *Lexis*, I dropped those for which no briefs were available and those where the Court opinion gave no reasoning behind a decision.[[1]](#endnote-1) For the remaining cases, I used *Lexis* to identify the cases for which the parties’ briefs, the amici briefs, or both, included at least one reference of foreign or international law, by reading the list of authorities each brief contains. Following this process, I identified 223 cases with citations to transnational sources in litigants’ briefs and 334 cases with transnational references in amici briefs.

The next step involved the classification of Supreme Court opinions depending on whether they engaged in transnational communication or not. To find opinions that cite foreign or international law, I conducted several key word searches on *Lexis*, looking for titles of international treaties, names of foreign and international courts, and international law more generally. After identifying cases that included at least one such citation, either in the majority or the minority opinions, I looked at the text of the opinion to ensure that my search had identified instances of transnational communication correctly. Furthermore, I skimmed through the language of the opinions that, according to my search, did not include foreign and international law citations, to verify that there were no relevant cases that were not included in my results. Through this process, I identified 143 cases that referred to transnational authorities, out of 2247 cases. From these 143 cases, 106 included at least one citation in the majority opinion.[[2]](#endnote-2)

A descriptive analysis of the data, presented in Figure 1, indicates that, first of all, transnational communication through Supreme Court opinions has steadily increased through the years. Furthermore, a similar proliferation is evident in the case of both parties’ and amici briefs. Especially in the case of amici, the citation of foreign and international law eventually becomes almost a common occurrence, since between 20 and 30% of the cases the Supreme Court decided after 2003 have attracted at least one amicus brief that refers to transnational sources.

[FIGURE 1 ABOUT HERE]

In order to proceed with an empirical analysis of my dataset, I utilized my citation dataset, in combination with variables already existing in the Supreme Court Database. The dependent variable of this study, *Opinion Citation*, was coded 1 for cases that include at least one citation of foreign or international law at any point of the majority or minority opinion, and 0 otherwise.

The two main independent variables of interest, *Party Brief Citation* and *Amicus Brief Citation,* were coded 1 if a reference of transnational law occurred in one of the litigants’ briefs and in at least one of the amici briefs respectively. On the contrary, if the briefs cited only domestic law, these variables were coded 0.

Apart from the two independent variables, I included several controls in my model to account for other factors that might affect the language and sources Supreme Court Justices use in their opinions. The *Lower Court Citation* variable aims to control for the influence of the lower court opinion on the Supreme Court opinion content, based on previous research that indicates a link between the two (Corley, Collins, and Calvin 2011). To construct this variable, I looked at the lower court opinion corresponding to each Supreme Court case in my dataset, and searched for transnational citations. If at least one such citation was found the variable was coded 1, and 0 otherwise.

Moreover, I control for the effect that a case involving a foreign issue might have on the likelihood for foreign and international citations appearance, with regards to both the opinion and the briefs content. A case that requires the Justices to engage in treaty interpretation, for instance, is almost certain to attract transnational citations in the court opinion as the Court discusses the treaty, and in the briefs, as they give their own interpretation of the authority under discussion. To construct the variable *Foreign Issue,* I looked at the description of the facts of the case in the court opinion, and coded the variable 1 if the case involved treaty interpretation, or foreign citizens, companies, or countries. If the case dealt solely with domestic issues, the variable was coded 0.

Furthermore, I constructed a variable to control for previous references to transnational law in a specific issue area by the Supreme Court. The logic behind the inclusion of *Previous Citation* is that both the Supreme Court and litigants’ and amici briefs might be more likely to rely on foreign and international law authorities if the highest court of the land has signaled that it considers such sources appropriate for the specific issue. To construct this variable, I used the *Issue* variable coded in the Supreme Court Database, so as to identify the earliest occurrence of transnational communication in each issue. I then coded Previous Citation as 1 for all the cases in the same issue area that followed the initial occurrence, and as 0 otherwise. It should be noted here that this variable does not account for the use of foreign and international law in Supreme Court cases that fall outside the range of years covered in this study.

To control for the effect of a case’s importance on the likelihood of citation, as well as to account for previous explanations of transnational communication, I included in the model two variables coded in the Supreme Court Database, namely, *Overturn Precedent* and *Judicial Review.* Finally, the model includes a *Year* variable to control for the proliferation of the phenomenon, and a fixed effects variable controlling for the author of the majority opinion in each case.

**Results**

Table 1 shows the results of the logit model, which assesses the effect of the use of transnational language on behalf of litigants and friends of the court on the Court opinion’s content.

[TABLE 1 ABOUT HERE]

As shown in the results, the Brief Citation and Amicus Citation variables are both statistically significant at the .01 level and are moving in the anticipated positive direction, confirming the two hypotheses of this study. United States Supreme Court Justices are more likely to engage in transnational communication through their written opinions when litigants and amici provide them with information about foreign and international law that is applicable to a case. Furthermore, these results hold true when controlling for other sources of opinion content, such as inclusion of a transnational citation in the lower court opinion.

Moving on to the control variables of the model, the findings confirm previous expectations regarding the effect of instances when the Justices engage in judicial review or overturn established precedent on the likelihood of global judicial dialogue. The Overturn Precedent variable is statistically significant at the .01 level and the Judicial Review variable at the .05 level, while they are both moving in the expected positive direction, indicating that the Supreme Court is more likely to rely on foreign and international law citations in cases of increased significance.

The results also provide support to earlier research on the influence of lower court opinions on the Supreme Court opinion’s content, as the Lower Court Citation variable has a positive coefficient and is statistically significant at the .01 level. Finally, and as expected, the involvement of foreign issues in a case is correlated with an increased chance of a transnational citation appearing in the court opinion.

In order to better understand the magnitude of the effect that the briefs’ foreign and international law citations have on judicial transnational communication, I calculated predicted probabilities for the two independent variables of interest. With all the other variables set to their mean values, when both the parties’ and the amici briefs refer to foreign or international law, the probability of the Supreme Court relying on transnational sources is 0.15.[[3]](#endnote-3) On the contrary, when the briefs cite only domestic sources, the probability of transnational dialogue by the Supreme Court falls to 0.02.[[4]](#endnote-4) The citation of foreign or international law by the parties or amici only also results to a low probability of Supreme Court citation, namely, 0.05 and 0.06 respectively, when all the other variables are set to their mean values.[[5]](#endnote-5) Finally, in cases that deal with domestic issues and with which the court overturns precedent and engages in judicial review, such as *Roper* v. *Simmons,* reliance on transnational sources by both types of briefs raises the probability of a Supreme Court opinion citation to 0.42, compared to 0.06 when no such reference exists in any of the briefs.[[6]](#endnote-6)

To get a more concrete idea on how transnational citations flow in the American judicial system, I mapped the citations route of the Convention on the Rights of the Child through federal courts and Supreme Court parties’ and amici briefs. I chose to follow the process of this specific international treaty, first, because it was signed in 1989 and took effect in 1990, therefore it could not have been used as an authority in cases falling outside the year range of this study. Second, because even though the United States has not ratified the treaty yet, it has nevertheless appeared in landmark Supreme Court decisions.

The first citations of the Convention on the Rights of the Child occur in the amici briefs submitted by the American Bar Association and by Amnesty International in a 1993 Supreme Court case dealing with the deportation of an alien minor (*Reno* v. *Flores*), followed by references by the Seventh and Tenth Circuit Courts of Appeals in 1994 and 1999 respectively (40 F.3d 1139 and 179 F.3d 1066), and a Supreme Court amicus brief by Equality Now in 2001 (*Nguyen* v. *INS*), all in deportation cases. Between 1989 and 2005, when the Supreme Court first cited the Convention in *Roper* v. *Simmons*, the treaty was cited in 15 federal district and circuit court cases and two Supreme Court amici briefs relating to immigration law and violations of human rights abroad.

During the same time frame, the Convention started appearing in a small number of cases relating to domestic issues, first in 1999, when the Seventh Circuit Court of Appeals referred to it in a discussion on childhood disability services (179 F.3d 1066), and in 2002, in the U.S. District Court for the Eastern District of New York, in its considerations regarding the removal of children of battered mothers (203 F. Supp. 2d 153). In 2003, the Convention was cited for the first time in a domestic issue at the Supreme Court, in an amicus brief filed by Amnesty International, in *Lawrence* v. *Texas*.

While the U.S. Supreme Court engaged in transnational communication in *Lawrence* v. *Texas*, it did not include the Convention in its opinion. Two years later, however, Justice Kennedy with his opinion in *Roper* v. *Simmons*, added the treaty to an increasing list of international authorities the Court has used. In this case, both the respondent brief and several amici had asked the Court to include the Convention in its consideration of the case.

After *Roper* v. *Simmons*, citations of the Convention in amici briefs steadily increase; the authority has been utilized in cases ranging from the interpretation of the 14th Amendment, to abortion, to same sex marriage, and from friends of the court diverging from the National Association of Evangelicals to Human Rights First and international law scholars. The next Supreme Court moment for the Convention arrived in 2010, when the Court found that life imprisonment without parole for juveniles was a violation of the 8th Amendment (*Graham* v. *Florida*). In his opinion, Justice Kennedy mentioned that both the petitioner and several of the amici, including the American Bar Association, the Center for Law and Justice, and the American Association of Jewish Lawyers, referred to the Convention in their briefs.

The path of citations of the Convention on the Rights of the Child by different actors of the American legal system supports the statistical findings suggesting that Supreme Court Justices make use of the information provided to them by others in the process of global judicial dialogue. At least when it comes to the specific international instrument, the Convention first made its way into the American system in amici briefs, one of them submitted by an international organization, while the two times when the Supreme Court included the Convention in its opinion language, parties and amici had discussed the treaty in their briefs.

**Discussion**

The analysis of the citation of foreign and international law in domestic court opinions in this paper began with the mention of Justice Kennedy’s address of the Convention on the Rights of the Child in the high-profile case *Roper v. Simmons*, a case where the Supreme Court engaged in judicial review, overturned precedent and made an ideologically divisive decision. While it is only natural for transnational communication to gain attention by its use in Supreme Court opinions in landmark cases like these, the findings of this study indicate that Supreme Court Justices are not the only significant actors participating in the process of judicial globalization. Litigants and friends of the court, through their briefs, provide the Justices with information, therefore enabling the Court to engage in transnational dialogue.

As this is the first study that assesses the effect of the briefs’ language on Supreme Court opinion content related to global judicial dialogue, there are numerous avenues for future research. First, a case study analysis similar to the one presented here focusing on the Convention on the Rights of the Child could show whether other treaties follow the same route of diffusion, by entering the American legal system through the merits briefs. Such case studies could be further enhanced by the use of language analysis software, so as to match transnational language included in the briefs to Supreme Court opinion content.

Furthermore, a diverse group of amici appear to rely on foreign and international law to promote their arguments. Why do these groups engage in this behavior and others do not? When amici are amenable to transnational citations, how do they decide which cases are appropriate to do so? Interviews with groups that frequently submit briefs for the consideration of the Court could shed some light to this issue. In addition to interviews, it would be interesting to assess whether, with their transnational citations, parties and briefs target the median Justice of the Court when he or she is friendly to the practice, and avoid it otherwise.

In conclusion, pressures from below, by litigants and friends of the court, are a significant aspect of judicial globalization. The expansion of transnational groups networks, along with the increase in availability of foreign and international legal materials, combined with the reality of an interconnected world, suggest that such pressures will only intensify in the future.

**Appendix**

**Table 1: Number of cases citing transnational law in Supreme Court opinions, parties’ briefs and amici briefs per year.**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Year | Total Number of Cases | Court Opinion | Party Brief | Amicus Brief |
| 1989 | 142 | 7 | 11 | 9 |
| 1990 | 128 | 10 | 13 | 9 |
| 1991 | 115 | 8 | 10 | 8 |
| 1992 | 104 | 10 | 11 | 11 |
| 1993 | 104 | 10 | 11 | 13 |
| 1994 | 90 | 2 | 2 | 5 |
| 1995 | 83 | 2 | 2 | 3 |
| 1996 | 76 | 4 | 2 | 3 |
| 1997 | 85 | 2 | 0 | 3 |
| 1998 | 88 | 4 | 2 | 4 |
| 1999 | 73 | 5 | 3 | 5 |
| 2000 | 81 | 5 | 3 | 6 |
| 2001 | 78 | 2 | 8 | 17 |
| 2002 | 79 | 3 | 3 | 11 |
| 2003 | 76 | 6 | 11 | 19 |
| 2004 | 75 | 8 | 15 | 17 |
| 2005 | 73 | 6 | 9 | 15 |
| 2006 | 70 | 7 | 13 | 15 |
| 2007 | 68 | 4 | 8 | 14 |
| 2008 | 64 | 6 | 8 | 15 |
| 2009 | 76 | 7 | 11 | 20 |
| 2010 | 76 | 10 | 18 | 26 |
| 2011 | 75 | 4 | 7 | 19 |
| 2012 | 66 | 6 | 12 | 14 |
| 2013 | 77 | 6 | 11 | 18 |
| 2014 | 65 | 7 | 7 | 19 |
| 2015 | 60 | 5 | 9 | 13 |

**Notes**

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**Table 1: Effect of Foreign and International Law Citations in Parties’ and Amici Briefs on Supreme Court Transnational Communication**

|  |  |
| --- | --- |
|  |  |
| VARIABLES | Opinion Citation |
|  |  |
| Party Brief Citation | 1.061\*\*\* |
|  | (0.304) |
| Amicus Brief Citation | 1.290\*\*\* |
|  | (0.291) |
| Lower Court Citation | 2.069\*\*\* |
|  | (0.405) |
| Foreign Issue | 1.988\*\*\* |
|  | (0.284) |
| Previous Citation | 0.228 |
|  | (0.256) |
| Year | -0.00385 |
|  | (0.0198) |
| Judicial Review | 0.362\*\* |
|  | (0.170) |
| Overturn Precedent | 1.611\*\*\* |
|  | (0.442) |
|  |  |
| Observations | 2,247 |

Robust standard errors in parentheses

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

The model also includes opinion author fixed effects that have been omitted from the table in the interest of space.

**Figure 1: Percentage of Cases that Cite Transnational Law in Court Opinion, Party Briefs and Amici Briefs per Year.**

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1. These were mostly cases where the Court decided that a writ of certiorari was improperly granted, and cases getting to the Court under its original jurisdiction. [↑](#endnote-ref-1)
2. See Appendix for a table that shows the occurrence of transnational citations per year in Supreme Court opinions, parties’ briefs and amici briefs. [↑](#endnote-ref-2)
3. 95% confidence intervals: 0.08, 0.23. [↑](#endnote-ref-3)
4. 95% confidence intervals: 0.01, 0.02. [↑](#endnote-ref-4)
5. 95% confidence intervals: 0.02, 0.08 and 0.03. 0.09. [↑](#endnote-ref-5)
6. 95% confidence intervals: 0.18, 0.66 and 0.01, 0.12. [↑](#endnote-ref-6)